Before the U.S. Surface Transportation Board

STB Docket No. EP 755

Final Offer Rate Review

STB Docket No. EP 756

Market Dominance Streamlined Approach

Comments of the
U.S. Department of Agriculture

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Authority and Interest

The Agricultural Adjustment Act of 1938 and the Agricultural Marketing Act of 1946 entrust the Secretary of Agriculture with representing the interests of agricultural producers and shippers in improving transportation services and facilities. As one of many ways to accomplish this mission, the U.S. Department of Agriculture (USDA) initiates and participates in Surface Transportation Board (STB or Board) proceedings involving rates, charges, tariffs, practices, and services.

Introduction

USDA appreciates the Board's attempt to make the rate reasonableness review procedures more usable and available to shippers. As the Board has recognized, these procedures are complicated and largely inaccessible to agricultural and other shippers.

The concepts behind rate review and market dominance are deeply intertwined. In order to connect the concepts and provide a broader take, USDA has combined its comments on these proceedings into one submission. The first section briefly provides economic context for why the Board's measures are so important and why change is necessary. Later sections examine the concepts more deeply and offer more suggestions for the Board to consider as it evaluates these rulemakings. The final section summarizes USDA's recommendations.

Preface: The Need for Change

In its Final Offer Rate Review (FORR) proposal, the Board cites economic principles as guiding this choice—an approach that USDA commends. It is, therefore, worth briefly discussing key elements in the economics of railroad pricing to contextualize the remainder of these comments.

USDA recognizes that because railroads have high fixed costs, they need to be able to price above marginal cost in some markets in order to obtain enough revenues to cover the costs of infrastructure needed for their network. In economic theory, marginal cost pricing is the "first-best" approach, or what economists refer to as "efficient." However, in the presence of high fixed costs, economic theory considers Ramsey pricing, or "differential pricing" to be the second-best efficient approach.

To recover fixed costs more effectively across its network, differential pricing allows a railroad to impose higher rates on traffic with fewer transportation options, even though the characteristics of the movement may be the same as those experienced by shippers with more competitive transportation options. Thus, with differential pricing, a firm can price each of its customers according to the demand elasticity of that market, subject to the constraint that total revenues do not exceed total costs, including normal (reasonable) profits. In other words, railroads can charge higher rates in the places where they have the most market power.

Because railroads have such high fixed costs, there are economies of scale to consolidation. When too many railroads compete, each individual railroad gets too little revenue to cover its fixed costs. Since the Staggers Rail Act of 1980, railroads have consolidated and gained market power. This has enabled railroads to cut costs while earning higher revenues. For a couple of decades, railroads cut costs enough to reduce prices for shippers. However, since around 2000, average rates have generally increased.[1] In 2019, shippers are in the unenviable situation of facing high rates and limited competition among carriers.

This simple economic framework helps lay out the regulatory problem confronting the Board. There are essentially two economic problems with which the Board must grapple. The first is, while railroads can differentially price, rates over which the Board has jurisdiction must be reasonable. The railroads are common carriers, so while some differential pricing might be second-best efficient, excessive rates can be unfair or unreasonable. In this and many other instances, economics explains what may be done but not what "should" be done. Therefore, the Board must balance the need for railroads to earn adequate revenues using differential pricing with the need for shippers to receive reasonable rates that are fair. For this to happen, shippers must have access to rate review processes that are indeed readily usable and available to shippers.

The second related problem the Board must grapple with is the inefficiency of railroads earning revenues beyond their total cost (or return on investment beyond their cost of capital). The fact that a railroad can charge monopoly prices to captive shippers does not mean those captive shippers should pay monopoly premiums above what is necessary for the railroad to recover its fixed costs. The second-best efficiency justification for differential pricing relies upon the constraint in the theory that total revenues do not exceed total costs. If total revenues rise beyond total costs, the "efficiency argument" behind unconstrained use of differential pricing is gone. From the national perspective, economically healthy railroads are of little value without economically healthy shipping customers—a strong national economy depends on both. Therefore, the Board must balance the need for differential pricing that is reasonable and fair with the concern that the railroad's market power can extend too far.

USDA believes FORR can be an effective addition to the STB procedures and, coupled with the streamlined market dominance test, it may give shippers a valuable rate review option.

EP 755: Final Offer Rate Review

USDA supports the Board's final offer approach to rate review and appreciates the Board has heard and incorporated prior recommendations from groups like USDA and the Transportation Research Board's (TRB) committee for a study of freight rail transportation and regulation. USDA believes final offer rate review (FORR) has the potential to create a low-cost but high-value rate review process for shippers with unreasonable rates. The approach to substantially reduce procedural timelines and to provide methodological flexibility and innovation is commendable and worth trying.

Final Offer Rate Review Is Accessible and Effective

USDA commends the Board in its efforts to reduce litigation costs through procedural constraints rather than ornate and complicated substantive constraints that history shows tend to delay decisions and escalate the costs of shippers bringing a case. The tight timelines and other procedural limitations will help to make the process one that shippers can use.

It is important to recognize the relationship between accuracy and accessibility. At face value, it seems like there is a tradeoff between the two, where more accurate tests are more costly and therefore less accessible. However, this is a too narrow view of accuracy that ignores whether a

[1] Wilson, W. 2019. "Rail Rates for Grain Shipments over Time."

test is actually used and, if not, what is missed. Although a test might be highly accurate, if it is too costly to use, then its practical accuracy is much lower. That is, some cases involving rates that the test would have deemed unreasonable are never actually seen and, thus, those rates are effectively deemed reasonable (i.e., false negatives). For example, although the stand-alone cost (SAC) test may have large shares of true positive and true negative results, it misses all of the cases that shippers cannot bring because of its high cost barrier. A complete accounting of these errors is necessary to truly gauge the accuracy of a test. USDA supports the FORR proposal because it is a more accessible test, which will enable the Board to get a more accurate view of real rate issues facing shippers.

In addition, USDA believes tightening procedural constraints improves the quality of evidence that participants present. It reduces the need for substantive evidence constraints, which means it expands the realm of possible evidence participants can submit. At the same time, the procedural constraints incentivize participants to provide only their strongest evidence, while enhancing its simplicity and reasonableness. That is, the best evidence would never be ignored, and only the best evidence would ever be seen.

Final Offer Rate Review Can Provide Clear Standards Along with Flexibility

The Board's proposal also allows for more methodological flexibility, which creates a process that better captures the broader principles behind STB's statutory requirement to provide effective rate review. As the Board points out, those principles should include the Rail Transportation Policy, the Long-Cannon factors, and sound economic reasoning.

However, the difficulty is that no single methodology of rate review captures all of these broader principles. Each has strengths in capturing a particular aspect of the big picture of effective rate review, but none captures the whole picture. For instance, SAC—the notion that a shipper should not bear costs from inefficiencies or facilities from which it derives no benefit—is an important aspect of rate considerations and is measured thoroughly by a SAC analysis. However, it is far from the only consideration in effective rate review. Any one methodology that did capture the whole picture would be extremely complex and costly.

In a recent letter to the Board, the Association of American Railroads (AAR) described FORR as "arbitrary" and having an "absence of standards by which rate reasonableness could actually be determined."[2] USDA disagrees. As is discussed in the preceding paragraph and in the Board's Notice of Proposed Rulemaking (NPRM), the principles of effective rate review, while multi-faceted, are very clear. The only open question is how to determine whether one of those principles has been violated.

USDA believes the Board could be more explicit in their final rulemaking about the types of actions that represent a violation of those principles. For instance, one action might be an "extreme markup of price above cost," which would be targeted toward 49 U.S.C. § 10101, avoiding "undue concentrations of market power." Being more explicit in this way would mitigate the concern of arbitrariness, while still leaving it up to case participants to determine the best methodology and evidence to demonstrate extreme markups. The Board could also be more explicit about how revenue adequacy principles in Rail Transportation Policy might translate into a determination of unreasonableness.

[2] Association of American Railroads. October 22, 2019. Comments in EP 755, Final Offer Rate Review.

In its letter, AAR suggests a "comparison group approach" to rate review. Although the details of what AAR suggests in the letter are vague, shippers have long criticized the comparison group approach in the Three-Benchmark (3B) procedure, not only for being too complex and costly to utilize but also for being, ultimately, an invalid measure of unreasonableness. This disconnect gets at the heart of why FORR is needed. If railroads truly believe their comparison group approach provides unambiguous evidence of rate reasonableness, then they can submit that evidence in their final offer. However, shippers can also submit the evidence they believe shows why the rate is unreasonable from their perspective. Each party having the flexibility to provide their best evidence is vitally important in getting an outcome that is reasonable.

USDA believes the FORR process is a significantly better option than yet another round of 3B modifications and rejects the claim that it represents an absence of standards. However, while USDA commends the Board for trying something new, it also recognizes that with change comes some uncertainty. To mitigate those concerns, USDA suggests the Board establish FORR through an initial pilot phase to be evaluated after a set period or set number of cases. The idea is to craft something that can be used as a real-world experiment to try out new processes to see if they are used by shippers, work well, and are seen by the community as a positive step toward making rate review accessible. If the experiment works, the FORR process can be adopted permanently. If not, another approach can be tried.

Request Simple Final Offers

While maintaining the overall concept of flexibility in the evidence presented, the Board should consider establishing additional constraints on what can be included in a final offer. While the "incentive effects" in the Board's proposal are likely to produce more simplified and reasonable evidence, it is still possible, especially without additional guidance, that both parties could present overly complicated evidence that will make it nearly impossible for the Board to assess in a short timeframe which party's offer is more reasonable.

USDA believes the Board can help mitigate this concern with other procedural constraints, such as limiting the length of submissions, and perhaps by providing more general guidance on the types of evidence that should or should not be provided. For example, final offer processes used in other matters work best with each party providing only a single number (e.g., baseball-style arbitration). The Board might similarly attempt to restrict the content of the final offer. The more complicated the offered remedy is, the harder it will be to assess its reasonableness in a short timeframe.

The Proposed Relief Cap Is Too Low

USDA also recommends the Board raise the $4 million relief cap proposed for FORR. USDA recognizes the Board's aim to use relief caps as a means of channeling higher value complaints to the appropriate rate review process. However, there are three reasons to institute a higher cap, if not remove it altogether.

The first is there is uncertainty for case participants as to whether they will win, which creates gaps in the current channeling structure. Uncertainty in the case outcome means the expected value of the case before it is initiated by the shipper (ex-ante) is lower than the relief won after the fact (ex-post). The Board is using the ex-post case value in its channeling structure when what matters is the ex-ante expected value when deciding whether to bring a case or not and which proceeding to use. In other words, setting the relief cap to the cost of the next-higher rate review process assumes shippers believe they have a 100-percent chance of winning, which does not reflect what shippers actually expect. With a lower expected chance of winning (say 75 percent), a shipper with a claim worth $5 million dollars if the case is won (ex-post) has only a $3.75 million expected value (ex-ante) of bringing a case. However, if a shipper had an ex-ante expectation of a $4 million cost of bringing a Simplified SAC (SSAC) case, the Board has previously found that the shipper would not choose to use SSAC because the expected costs would outweigh the expected benefits. This shipper, therefore, has no way of obtaining the full relief it may be due if the rate is, in fact, unreasonable.

Second, it is not clear FORR logically fits into the same channeling structure as SAC, SSAC, and 3B. That structure makes the clearest sense for SAC and SSAC. SSAC is a less general case of the SAC test. In being less general, it is potentially less accurate, so it makes sense to channel higher valued cases towards the higher accuracy test. However, 3B is only weakly related to stand-alone cost, if at all. The 3B process seems to measure different aspects of rate reasonableness concerns—namely, the degree of differential pricing with respect to comparable traffic and revenue adequacy. Therefore, it is unclear why 3B would fall below the two SAC tests as a "very simplified SAC." The same is even more true of FORR, which could potentially cover any aspect of the broader rate review concerns, from stand-alone cost, to differential pricing extremes, to revenue adequacy concerns. It is also not obvious how much less accurate stand-alone cost evidence would be, if presented under FORR. Once the true accuracy of the test is accounted for, including the false negatives from inaccessibility, there is little reason to believe a process like FORR would be less accurate than SAC. In general, it is not obvious FORR fits into the current channeling structure, which also makes it unnecessary to fit it to the current relief scale.

Third, the design of the FORR process helps temper the remedy. It is worth noting that, with FORR, the Board would not be tied to a remedy in the way it might be with a more explicit method (e.g., SAC) that defines upfront precisely how much is reasonable. In the case of FORR, there is no necessary, direct connection between the methodology or methodologies used to demonstrate unreasonableness and the final offer rate. For instance, if a shipper uses one or more methodologies that show unreasonableness but believes the methodologies contain some uncertainty or ambiguity, the shipper might offer a rate lower (more reasonable) than the direct functional result of those methodologies.

In general, FORR incentivizes reasonable arguments and evidence, so there should be less concern about unreasonable remedies occurring. If, for example, a shipper makes a convincing case the rate is unreasonable, yet seeks an unrealistic remedy, then the Board, acting collectively, may not see that package as the more reasonable and accurate. On the other hand, if a shipper were to demonstrate very convincingly the rate is exceptionally unreasonable and ask for a remedy above the current proposed cap (say, amounting to $4.5 million based on the amount of traffic that was affected by the unreasonable rate), it is unclear why, the Board, upon finding the shipper's offer fair, should be prevented from accepting it. Without effective competition, the railroads' ability to price their service is essentially unconstrained. Unless relief from rate review is also unconstrained to check the railroads' potential excesses, the shipper is at a distinct disadvantage. Otherwise, an arbitrary cap signals an arbitrary extent for protection against unreasonable rates.

For these reasons, USDA believes the Board should remove the relief cap altogether. At the very least, there is significant rationale for the Board to raise the FORR relief limit beyond $4 million.

The FORR Process Should Be Transparent

Finally, USDA does not agree with the recent recommendation from the TRB study committee authors to keep case details as limited as possible. USDA believes transparency will allow for the methodological innovations the Board recognizes to be a valuable result of the FORR process. Transparency also reduces the uncertainty for shippers deciding whether to bring a case. The committee authors argue a lack of transparency prevents precedents from developing and a lack of precedents maintains the flexibility of the FORR process.[3] However, it is unclear why precedent would be undesirable. Cases with similar facts should be decided similarly. Not only could that be a fair process, but a more efficient one when shippers have a better estimate of their case outcome, given the facts of their own situation and knowledge of how prior similar cases have played out in the FORR process. Flexibility should be maintained only when the facts change, and a transparent FORR process would allow that flexibility. Moreover, increased transparency will foster more responsible behavior on both sides of the market.

Recommendations

USDA has three recommendations to help improve the FORR process:

- Set a pilot or evaluation period for FORR
- Provide more guidance on the required content(s) of a final offer with an emphasis on simplicity
- Remove or significantly increase the relief cap

EP 756: Market Dominance Streamlined Approach

USDA supports the Board's goal of reducing market dominance determination costs and offers the following considerations and recommendations.

The Need for a Streamlined Market Dominance Approach

The Board's decision displays an accurate assessment of the need for change, and USDA will not belabor this point. The record is clear on this: "The market dominance inquiry is a costly and time-consuming undertaking, resulting in a significant burden on rate case litigants."[4] Indeed, "An overly complicated and costly market dominance inquiry can itself be a barrier to rate relief, even in cases where there is no effective competitive restraint on rail rates."[5] USDA appreciates the Board's recognition of this and its work to achieve a streamlined approach. USDA begins with this principle because the need for change is real and serves as an important and unfailing backdrop to reform. As discussed in the FORR section, improving the accessibility of a test can also improve its accuracy. For this reason, USDA strongly supports streamlined market dominance procedures.

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[3] Boyer et al. October 17, 2019. Comments in EP 755, Final Offer Rate Review, and EP 756, Market Dominance Streamlined Approach.

[4] Surface Transportation Board. Decision. Docket No. EP 756: Market Dominance Streamlined Approach. Decided September 11, 2019.

[5] Ibid.

False Positives Are Better Than False Negatives

A balanced approach to rate review and market dominance recognizes and weighs the costs of both false positives and false negatives. The cost of a false negative market dominance determination is at least as high as a false positive. In other words, a costly mistake is made when a railroad's rate is determined unreasonable when the railroad does not in fact have market dominance (false positive), but a costly mistake is also made when a shipper's case is inaccurately dismissed by the market dominance test when the shipper's rate is in fact unreasonable (false negative). In whatever is decided, there should be a balancing and awareness of these two errors.

However, the latter case—where a market-dominant railroad is deemed to not be market dominant—is likely worse and should be more stringently avoided. A market dominance determination is always followed up by a rate-reasonableness test. That rate reasonableness test acts as a failsafe to help prevent the costly error of requiring a not-market-dominant railroad to pay relief. Market dominance and rate reasonableness, although legally distinct, are economically and statistically highly related concepts. Even if a market dominance test mislabels a railroad as market dominant but there is effective competition, the railroad's rates are less likely to be unreasonable in the subsequent rate reasonableness analysis.

Contrast this false positive error with the mislabeling of a railroad as not being market dominant. In the case of this false negative error, a shipper facing unreasonable rates has no recourse once the incorrect market dominance decision is made—there is no subsequent rate review test. The structure of the market dominance and rate review sequence naturally protects railroads from false positives in the market dominance test. In designing a market dominance screen, the Board should be cognizant of this bias and make the screen relatively inclusive for shippers.

In addition to the succession of market dominance and rate review providing a failsafe for market dominance decisions, the Board has proposed adding a failsafe in the form of the *prima facie* presumption. Even if a shipper meets the screening criteria, the railroad still can rebut before a Board determination is made and before a rate reasonableness test even begins. For this reason, the cost of a false positive with respect to the initial screen is especially low. Therefore, the Board should make the market dominance screen very inclusive.

Perspective on the Proposed Market Dominance Factors

The Board's proposal contains six factors that, together, would provide *prima facie* evidence of market dominance. In the Board's proposal, a shipper would have a presumption of market dominance when the movement at issue: (1) has a revenue to variable cost ratio of 180 percent or greater, (2) exceeds 500 miles between origin and destination, (3) has no intramodal competition, (4) has no barge competition, (5) involves a complainant who has used truck for less than 10 percent of its movements, and (6) involves a complainant who has no practical build out alternative.

In general, USDA supports the approach to streamline market dominance through a set of bright-line factors. However, USDA has some concerns over the factors chosen in the proposal. Specifically, USDA is most concerned with factor 5, the truck percentage factor of the proposed streamlined market dominance test, as discussed in the next section. More generally, USDA also has concerns over the definition of market dominance and how it relates to factors two through six. Both the specific and more general concerns are discussed in the subsequent sections.

Further, USDA suggests two alternative factors, a competitive benchmark factor or an additional (higher) revenue to variable cost (R/VC) threshold factor.

Truck Percentage Factor Is Not Clearly Related to Market Dominance

USDA has concerns about the impracticality of the fifth factor, the percentage of recent shipments moved by truck. The concern mainly stems from two reasons. First, the proposed 10 percent number is arbitrary and should not preclude someone from using the streamlined market dominance approach. The Board's decision conveys this fact: in one case, almost 99 percent of the movements were by rail, yet effective competition was found; in another case, 20 to 25 percent was by truck, yet that situation was found to be market dominant.[6] These findings suggest that one's dependence on rail transportation (i.e., rail's market dominance) is not strongly related to how much is shipped by truck. Therefore, a bright-line rule on the share of movements by truck would prevent potentially eligible shippers from bringing a case, thereby reducing the accuracy of identifying true market-dominant cases.

In addition, the suggested criterion is flawed because whether and how much a shipper uses truck service is, in part, affected by the railroad's position. If the railroad has market dominance and is exhibiting market power, such behavior could push a shipper to use more and more truck transportation. In fact, because higher rates force some customers out of the rail market, this is precisely why differential pricing is second-best and not first-best efficient. High rail rates resulting from rail market dominance could boost a shipper's truck share over the threshold, which would preclude the shipper from opening a rate case. Thus, strong applications of market dominance could defeat the very purpose of the screen, to detect its application in the first place.

Furthermore, trucks are not competitive with rail over long distances, and shippers may switch to trucks temporarily to access alternative markets (often with a much lower offer price) within shorter distances as a last resort to recoup some of their fixed costs. However, these shippers are still beholden to railroads to access more distant markets (often with much higher offer prices). Thus, these shippers remain captive to railroads for long-haul movements, which are integral to modern agricultural marketing and global competition.

The Board should remove the truck-percentage constraint.

Questionable if Factors 2 Through 6 Help Detect Market Dominance

USDA appreciates the Board streamlining market dominance through a set of factors but generally finds the qualitative approach to market dominance unsatisfying. The problem is market dominance is never defined clearly.

According to U.S. Code § 10707, "… 'market dominance' means an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies." At the surface, this might sound straightforward, but it is unclear what "effective" competition is.

The difficulty lies in determining whether modal competition is "effective" or not. From an economic perspective, market dominance is about demand elasticity. Under perfect competition, the demand curve facing the railroad is perfectly flat and railroads are unable to mark-up above

[6] Ibid.

cost. With less competition, the railroad's demand curve becomes steeper and markup rises. The Board simply needs to define a point at which markup (or elasticity) has gone too far.

The problem with the existing factors is they only get at markup, elasticity, and market dominance indirectly. This is related to the Cellophane Fallacy in antitrust economics. The fact that a shipper has alternative options at a given rail price does not mean that the railroad has no market power in setting that price. A market dominant railroad will set its price just below the price of the alternative option, say trucking, but the price of trucking may still be significantly above the railroad's cost of the move. Thus, even though trucking is a substitute for rail at the railroad's set price, the railroad could still be market dominant.

The Board could be more explicit in its final rulemaking about delineating at what distance, say, either barge or building-out becomes "practical" or an "effective" constraint. A bright-line screen would make it much clearer who qualified for the streamlined test. However, USDA believes there are better factors to determine market dominance in a straightforward and economically valid way that help cope with these concerns, which are discussed in the next sections.

Implement a Competitive Benchmarking Factor

In their recent letter to the Board, the TRB committee authors recommended a competitive benchmark as one of the *prima facie* market dominance factors.[7] USDA agrees the competitive benchmark could be a powerful screen. However, given the above discussion, USDA believes the benchmark would be appropriate in lieu of factors 2-6.

The competitive benchmark methodology focuses on measuring the degree of markup above cost. This would be an economically valid way to measure markup across the industry while controlling for a wide range of shipment characteristics and cost values. As described previously, the Board's task would be only to define a degree of markup beyond which the shipper would have a presumption of market dominance. For example, a threshold of two-standard deviations of markup above costs would cover over 95 percent of deviations around the predicted competitive rate (with a normal distribution) but could be too exclusive. Setting the threshold lower, at say a 1 or 1.5 standard deviation, would be more consistent with the fact the cost of false positive errors is low. In general, the idea is the Board could pick a level that grants a shipper the presumption of market dominance because that level effectively balances the need for accessibility and accuracy.

However, a practical issue for the Board to consider in using a competitive benchmark screen is whether the shipper has enough information to be able to bring a case. Having each shipper estimate and derive evidence from its own competitive benchmark model would not be consistent with the goal of streamlining the market dominance process. To address this issue, the Board could develop its own model for this use, with input from the broader community. The Board could provide the model results on its website, and shippers would have to know only their own shipment characteristics, similar to what shippers need to know to make use of the Board's Uniform Rail Costing System (URCS) Phase III program to estimate variable costs. With that information, it would just be arithmetic to determine whether the shipper fell outside

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[7] Boyer et al. October 17, 2019. Comments in EP 755, Final Offer Rate Review, and EP 756, Market Dominance Streamlined Approach.

the limit. It would be a relatively simple matter to create a web form that, upon being filled out, would provide an immediate market dominance classification.

Implement a Bright Line R/VC Factor

As the Board noted, there is a statutory threshold requiring an R/VC percentage of at least 180 before market dominance can be established and, ultimately, rate reasonableness can be explored. More specifically, according to U.S. Code § 10707, this 180-threshold is necessary in order to proceed further in the process but does not suffice in building a "presumption" of market dominance. If the Board is unwilling to use the competitive benchmark approach, USDA believes as an alternative the Board could implement an R/VC screen at a higher threshold, where a complainant meeting or exceeding that threshold would show market dominance *prima facie*. This is because—on a continuum of increasing R/VC, especially above 180—it becomes more likely that the carrier at issue is in fact market dominant. Higher markups over cost reflect market power. In very competitive scenarios, there is very little markup, as competition brings price down towards cost. Like the competitive benchmark, USDA envisions the R/VC threshold being an alternative rather than an addition to factors 2-6. Because factor 1 is a statutory 180-percent R/VC threshold, USDA proposes that the screen be a single 200-percent threshold for a presumption of market dominance.

In setting a screen, there is a trade-off between being too inclusive (risking false positive errors) and too exclusive (risking false negatives). As explained previously, USDA believes the Board should strive for balance, while also being aware of the greater risk of under inclusion. An R/VC screen of 200 strikes a reasonable balance between the concerns of railroads that worry about over inclusion and those of shippers that have a case for potential market dominance and need a useable screen. Despite the ambiguity in defining market dominance, it seems clear that a railroad facing "effective competition" would have a hard time charging a rate that is 200 percent of its variable costs.

A benefit to this approach is that it is accessible. Notwithstanding the statutory requirement and academic literature surrounding the flaws of the URCS, USDA agrees it is relatively straightforward to calculate variable cost using the Board's URCS Phase III.

Recommendations

USDA has three recommendations to help improve the streamlined market dominance process:

- Focus on developing a market dominance screen that is not just streamlined but also inclusive
- Remove factor 5, the truck percentage, from the screen
- Remove factors 2-6 and replace them with a measure of markup, either a competitive benchmark or an R/VC threshold

Summary

USDA supports the Board's effort to find ways of making the rate review process more accessible and usable for agricultural and other shippers. USDA understands the Board faces a difficult to task in balancing the variety of concerns in Rail Transportation Policy. USDA commends the Board's efforts in the proposals put forward to provide a more fair and balanced rail transportation system.

USDA believes the proposals put forth in EP 755 and EP 756 can be improved by the Board as follows:

(1) Establish a pilot evaluation period for FORR

(2) Provide additional guidance on final offer contents, with an eye toward simplicity

(3) Remove or raise the final offer relief cap

(4) Focus on accessibility and inclusiveness in finalizing a streamlined market dominance approach

(5) Remove the truck-percentage factor in the market dominance screen

(6) Replace factors 2-6 with an improved measure of markup and market power, either a competitive benchmark or a higher R/VC threshold.

Respectfully submitted,

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